United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-1458

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1458

UNITED STATES OF AMERICA,

Appellant,

-against-

ALBERT ANZALONE and
ANTHONY VIVELO,

Appellees.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REHEARING EN BANC

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- -x

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Preliminary Statement

This is an extraordinary case in which a three-judge panel of this Court has disregarded the Federal Rules of Criminal Procedure, prior holdings of this Court and the Supreme Court, as well as considerations of reason and practicality, to reverse a judgment of conviction in an opinion which concludes with an expression of sorrow for having "reverse[d] a conviction for so despicable a crime" (Op. on Rehearing, Slip op. p. 5204). The United States of America petitions for rehearing en banc because such relief is necessary to "secure or maintain the uniformity" of the decisions of this Court [F.R.App.P., Rule 35(a)(1)] and because the case does raise issues of "exceptional importance" [F.R. App. P., Rule 35(a)(2)], and because it believes that convictions for violating the civil rights of black citizens, which are so difficult to obtain and which stand as a symbol of its determination to enforce the rule of law, should not be

set aside without some sound legal reason.[1]

Statement of the Case

This case arises from a series of incidents of vandalism and arson directed against a black family that intended to move into a house on the same block on which the appellants resided in Staten Island, New York. "The house of the new black neighbors was subjected to hostile acts ranging from shooting out the front windows and splashing paint on the front door to an attempt to burn it down" [United States v. Anzalone, 555 F.2d 317, 318 (C.A. 2, 1977)]. After a local grand jury failed to return any indictments, the United States convened a federal grand jury, which indicted the two appellants, Albert Anzalone and Anthony Vivelo, as well as two others, for violation of the civil rights of the black family and for making false declarations, denying their complicity in the conspiracy, while giving testimony under a grant of immunity before the federal grand jury. Both appellants were convicted of a violation of 42 U.S.C. § 3631, which prohibits intimidating persons from

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[1] The reversal of the conviction also had the effect of reducing by one-third the period of incarceration imposed on the appellant Vivello. The panel affirmed the perjury convictions of both defendants, thus assuring that they would serve some time in jail. Although a retrial is possible, the enormous difficulties which civil rights prosecutions face hardly insure that a conviction will follow.

occupying a dwelling because of their race or color, and the appellant Vivelo was also convicted of conspiracy to deprive black citizens of their civil rights in violation of 18 U.S.C. §241. Moreover, both appellants were convicted of the charge of making false statements before the grand jury.

On appeal, the appellants made "no claim that there was insufficient evidence to prove their guilt beyond a reasonable doubt, nor [w]as there any claim of error asserted with respect to the court's charge" (555 F.2d at 319). The principal claim of both appellants, who relied on United States v. Hinton, 543 F.2d 1002 (C.A. 2, 1976), was that the civil rights counts should have been dismissed because of the "use" which had been made of their testimony before the grand jury which they gave under a grant of "use" immunity. No motion was ever made in the district court to dismiss the indictment on this ground, but "on the day the case was called for trial" on May 3, 1976, before a jury was impanelled, the "substance of the argument that proved to be the basis of the Hinton rule was made to the trial judge before trial in the form of a motion for a severance, as well as a motion to preclude" (Op. on Rehearing, Slip op. 5205). Although the district court said he would consider the motion, he stated he was "not prepared to expound" it, no doubt because it had been sprung on him at the last minute as an afterthought long after the time set for

the making of motions had passed. Moreover, the district court never, in fact, considered the claim or our argument that it was made too late, and the defendants never pressed him for any further ruling.

The Opinions of the Panel

A. The First Opinion

The initial opinion of the panel did not consider the threshold issue whether, in the absence of a motion to dismiss an indictment in the district court, the defendant could raise the issue, although F.R. Crim.P., Rule 12(f) provides that such a claim is deemed waived if not timely raised. The panel instead proceeded to the merits of the claim. The panel observed that (555 F.2d at 319):

> "When an indictment is the product of the immunized testimony it must be dismissed so far as substantive offenses are concerned. Kastigar, supra. And we have recently held that 'as a matter of fundamental fairness, a Government practice of using the same grand jury that heard the immunized testimony of a witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced.' United States v. Hinton, 543 F2d 1002, 1010 (2 Cir. 1976). In that case we reversed and ordered the dismissal of the indictment. The Hinton case involved a substantive count as noted.
>
> Since we there discussed the problem of using the 'same grand jury' in terms of 'fundamental fairness' and since the pervasive vice is that the same grand jury could not help but 'use' the immunized testimony in reaching its result, we are not prepared

> to say that the decision was only prospective in operation. The essential unfairness of 'using' that which may not be 'used' predated the actual exercise of our supervisory power, and trenches upon the constitutionally impermissible as defined in Kastigar, see 406 U.S. at 543, 92 S Ct. 1653."

B. The Opinion on Rehearing

Because the panel had apparently overlooked the oral argument which was made both in the district court (App. A. 30-32, 64), and in our brief (Br. p. 37), that the issue of the alleged improper use of the appellant's immunized testimony was waived because it had not been timely raised, we originally sought rehearing only to the panel. We observed that F.R.Crim.P., Rule 12 requires that such objections be raised prior to trial, within the time provided by this district court for making pretrial motions, and that absent a showing of cause and prejudice, the failure to file the motions timely constitutes a waiver [F.R.Crim.P., Rule 12(f)]. Since the issue was not raised until the day of trial, long after the previously set motion day, without any showing of cause or prejudice, we urged the panel to reconsider a reversal of a conviction which it had ordered "reluctantly" (555 F.2d at 319).

The panel granted the petition for rehearing, but again adhered to its decision reversing the judgment of conviction. The panel observed that "the substance of the argument that proved to be the basis of the Hinton rule was made to the trial

judge just before trial in the form of a motion for a severance, as well as a motion to preclude" (Slip op. 5202). The panel reasoned that "had there been severance, for which there was time, there could have been a proper reindictment, after Hinton came down" some five months later on September 27, 1976. Accordingly, on the assumption that had severance been granted the trial of the civil rights count would have been delayed five months, the panel concluded "that the government's contention that the substance of the Hinton argument was called to the court's attention too late is hypertechnical. We do not find waiver here" (Slip op. 5202). Accordingly, the panel concluded (Slip op. 5202):

> "We are particularly sorry to reverse a conviction for so despicable a crime, but the defect was called to the court's attention when it still would have been curable by a proper reindictment."

Reasons for Granting the Petition

A. Introduction

There can be no doubt that despite its stated reluctance to reverse the civil rights convictions, the panel strained beyond reason to do so. The assumption upon which the opinion on rehearing rested was that had a motion for severance been granted on May 3, 1977, the day of trial, then the defect could have been cured without the necessity of a retrial "after Hinton came down",

five months later, on September 27, 1976. This assumption, which justified the complete disregard of the waiver provisions of F.R.Crim.P., Rule 12, is simply unfounded. There can be little doubt that, had the severance been granted, we would have gone forward on the civil rights counts first, and tried the perjury charge only if the appellants were acquitted. The principal purpose of the prosecution, after all, was to vindicate the civil rights laws.

Moreover, this was not the only unfounded assumption. We are equally at a loss to understand on what basis the panel concluded that the defendants were entitled to the severance which the panel says should have been granted. The panel, however, never suggests on what basis such severance could have been granted. Certainly the rationale of United States v. Hinton does not go so far. In Hinton, a grand jury returned an indictment for a substantive offense, actually heard all of some 200 pages of immunized testimony (and returned no indictment for perjury). Here the petit jury would hear only the particular answers, all wholly exculpatory, which the grand jury determined were false. Moreover, the petit jurors here, unlike the grand jurors in Hinton, would not hear or see the appellants make the immunized statements. They would decide if the defendants were guilty of both the substantive and perjury counts solely on the basis of the same evidence at trial. Such false immunized

testimony enjoys no protection under the Fifth Amendment (United States v. Kahan, 415 U.S. 239 (1974); United States v. Tramunti, 508 F.2d 1334, 1342 (C.A. 2, 1974), certiorari denied, 419 U.S. 1079, the defendants hardly established any basis for a severance. See United States v. McGrath, ___F.2d___, Slip op. p. 4833-34 (C.A. 2, 1977).

Under these circumstances, the panel itself should set aside the order of reversal which is based on wholly unfounded assumption of fact and law. We petition for rehearing en banc, however, because we believe the holding that a motion to dismiss an indictment for a defect in the institution of the proceeding may be raised for the first time on the date of trial, flies squarely in the teeth of the clear language of F.R.Crim.P., Rule 12 and prior holdings of this Court and creates a mischevious precedent.

Moreover, we also believe that this case affords an appropriate vehicle for this court to resolve the conflict between the holding in United States v. Hinton, and the prior case law of this Circuit that there is no discretion, i.e.,supervisory power, to dismiss an indictment merely because a grand jury heard "tainted" evidence obtained in violation of the privilege against self-incrimination, if there was ample non-tainted evidence. The application of Hinton to a case where the grand jury found that the defendants made false exculpatory statements, is particularly absurd, since there is nothing for the grand jury to "use" in indicting for the substantive offense other than a possible inference of guilt which one draws from a false exculpatory statement. But, as this Court held in United States v. Tramunti, 500 F.2d 1334 (C.A. 2, 1974), cert.

denied, 419 U.S. 1079, false testimony under a grand of immunity enjoys no protection. Accordingly, if the grand jury believed the testimony was false, it was not improper to "use" the testimony in any way it pleased.

B. The Holding of the Panel Than an Objection Based on a Defect in the Grand Jury Proceedings May Be Raised For the First Time on the Day of Trial, Without Any Showing of Cause, Warrants En Banc Consideration Because It Creates a Mischevious Precedent Inconsistent with Settled Law and F.R. Crim.P., Rule 12.

F.R.Crim.P., Rule 12(b) provides that pretrial motions for dismissals based on defects in the institution of the proceedings, and for a severance, must be raised "before trial by motion." The procedures set forth in F.R.Crim.P., Rule 12, do not merely stop there, as the opinion of the panel on rehearing suggests. F.R.Crim.P., Rule 12(c) provides that at the time of arraignment the district court shall set "a time for the making of pretrial motion", and F.R.Crim.P., Rule 12(f), says that unless the motions are made "at the time set by the Court pursuant to subdivision (c)", the failure to do so "Shall constitute a waiver" of the claims.

Here, on January 8, 1976, the district court scheduled trial for May 3, 1976, and set April 5, 1976 as the return date for all pre-trial motions. Appellants did make various pre-trial motions, but none addressed to the matter of the improper use of their immunized federal grand jury testimony.

The application for a severance, which raised for the first time on the date of trial "the substance of this argument", was patently out of time even as a basis for the relief that was requested. United States v. Campisi, 306 F.2d 311, 312 (C.A. 2, 1962). Indeed, one of the reasons the district court judge was "not prepared to expound" on the issue (A. 88), without delaying the trial, was that it had been sprung on him at the eleventh hour. This is precisely the kind of evil F.R.Crim.P., Rule 12(f) was aimed at. As Judge Mansfield recently wrote (United States v. Yanagita, 552 F.2d 940, 945 (C.A. 2, 1977):

> "A motion made *** only minutes before the commencement of a multi-count, multi defendant trial, even when made in good faith--and here the trial judge found bad faith--must be viewed in light of the public's interest in preventing undue delay in bringing defendants to trial, as well as in light of the practical, but nonetheless critically important, public concern for the district court's caseload and calendar congestion, the expense and inconvenience of assembling witnesses and veniremen in a single location at a specified time, as well as the preparation efforts of the prosecution and defense attorneys."

In United States v. Yanagita, this Court held that two trial witnesses, who had prior notice of their scheduled trial appearance, had ample time in which to make a claim that they were the subject of illegal electronic surveillance. Said Judge Mansfield (552 F.2d at 945): "Under these circumstances, we hold that appelles' claim under § 3504 should have been asserted at an earlier point in time and their failure to assert it until

the morning of trial rendered it untimely."

The same considerations which motivated the opinion in Yanagita are equally present here. Indeed, like the district court judge in Yanagita, the district court judge here was faced with the choice of either delaying the trial to research the claim, which was made as an afterthought, or to go forward, as he did, without ruling on the issue. Moreover, had the issue been timely raised and ruled upon there would have been ample time to seek a new indictment, from a different grand jury, charging both the civil rights violation and perjury violation without the necessity of separate trials with which we are now faced. This is no "hypertechnical" objection. And the cases uniformly hold that a motion for a severance, or to dismiss an indictment on these grounds, or to suppress evidence, is untimely if made on the day of trial, even if prior to the selection of the jury, if there was ample opportunity to raise the claim beforehand. United States v. Campisi, 306 F.2d 311, 312 (C.A. 2, 1962); United States v. Hamilton, 469 F.2d 880, 882 (C.A. 9, 1972); Brooks v. United States, 416 F.2d 1044 (C.A. 5, 1969); United States v. Williams, 421 F.2d 519 (C.A. 8, 1970); Fleming v. United States, 378 F.2d 502, 504 (C.A. 1, 1967).

Moreover, there was no showing of "cause" or "prejudice" to justify the untimely assertion of the claim. Davis v. United States, 411 U.S. 233 (1974); Wainwright v. Sykes, ___U.S.___,

97 S.Ct. Rep. 2497 (1977). The appellants were aware all along of the basis for the claim. Nor can they seriously claim any "prejudice". There was more than ample "non-tainted evidence" to justify their indictment of the civil rights offenses. Indeed, the grand jury could hardly conclude they were guilty of perjury without concluding they were guilty of the civil rights offenses. In short, the defendants were justly tried and convicted and this Court should not tolerate the flouting of the Federal Rules of Criminal Procedure in which the panel engaged.[/]

B. The Petition for Rehearing En Banc Should Be Granted To Resolve The Conflict Between United States v. Hinton and United States v. Piccini, 412 F.2d 591 (C.A. 2, 1969).

We do not believe that it is a subject of serious doubt that a panel of this Court has no authority to overrule prior law. Until United States v. Hinton, supra, it was the settled law of this circuit that there was no discretion to dismiss an indictment merely because a grand jury may have heard tainted evidence, provided there was ample non-tainted evidence to sustain the indictment.

[/] In the course of its opinion on rehearing, the panel observed that: "In Hinton the motion to dismiss was made (at trial), 543 F.2d at 1007" (Slip op. 5203). Presumably, by this observation, it implied that a motion raising a Hinton claim would even be timely if raised in mid-trial. The timeliness of the motion was never an issue in Hinton and, in these circumstances can hardly be viewed as creating such a mischevious precedent. United States v. Archer, 486 F.2d 670, 681, n. 11 (C.A. 2, 1973).

As the Court observed in United States v. Tane, 329 F.2d 848, 853 (C.A. 2, 1964):

> "A defendant has no right to have an indictment dismissed merely because incompetent or inadequate evidence was presented to the Grand Jury. [citations omitted]. But a motion to dismiss or quash an indictment because of the absence of incompetency of evidence before the Grand Jury is addressed to the discretion of the trial court and the decision to grant or deny the motion will not be reversed unless there has been an abuse of that discretion. [citations omitted]. As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed" [citations omitted; emphasis supplied].

This principal applied even where the grand jury which returned the indictment heard evidence obtained from a defendant under statute immunizing his testimony. United States v. Piccini, 412 F.2d 591, 593 (C.A. 2, 1969).

In United States v. Piccini, supra, the Court observed (412 F.2d at 593):

> "We need not resolve this question, however, since the testimony given at the creditors' meeting was excluded from evidence at trial, and since the indictment returned by the grand jury was not based solely on the questioned testimony. Indeed, some thirty witnesses testified before the grand jury and detailed the situation portrayed on trial. We will not upset a conviction founded on an indictment based on sufficient, legal and probative evidence because other evidence of doubtful admissibility was also before the grand jury. See Lawn v. United States, 355 U.S. 339, 349, 78 S.Ct. 311, 2 L.Ed. 1021 (1910); United States v. Jordan, 399 F.2d 610, 615 (2d Cir. 1968); United States v. Tane, 329 F.2d 848, 853-854 (2d Cir. 1964).

United States v. Hinton failed to even cite this authority.[/] What it did rely on was the dictum in an opinion by Judge Friendly in Goldberg v. United States, 472 F.2d 513 (C.A. 2, 1973) which read as follows (472 F.2d at 516, n. 4):

> "Despite Lawn v. United States, 355 U.S. 339, 350, 78 S.Ct. 311, 2 L.Ed. 2d 321 (1958), and United States v. Blue, 384 U.S. 251, 255 & n. 3, 86 S.Ct. 1416, 16 L.Ed. 2d 510 (1966), we do not take it to be settled that an indictment would not be subject to dismissal if a defendant could establish that it was obtained on the basis of testimony compelled from him after a proper assertion of his privilege. See Jones v. United States, 118 U.S. App. D.C. 284, 342 F.2d 863, 871-873 (1964) (en banc)."

But it is plain that Judge Friendly had in mind an indictment "based" on the compelled testimony of the defendant, i.e., where there was no substantial independent evidence to sustain the indictment. Indeed, in Jones v. United States, supra, which Judge Friendly cited, a majority of the Court of Appeals - relying upon this Court's holding in Tane - remanded the case to the district court to determine whether there was independent

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[/] And the panel in Hinton dismissed as dictum the even stronger language in United States v. Calandra, 414 U.S. 338, 344-348 (1974), that:

> "[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, Costello v. United States, [350 U.S. 359 (1956)], ... or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, Lawn v. United States, 355 U.S. 339 (1958).

non-tainted evidence to support the indictments (342 F.2d at 863). In short, nothing in United States v. Goldberg provides the slightest basis for the holding in United States v. Hinton.

Moreover, the holding in Hinton is particularly inappropriate in a case in which the testimony is exculpatory and the only "use" that can be made of it is the inference one would draw from a false exculpatory statement. This is so because it is now settled that such inferences may properly be drawn from false testimony given under a grant of immunity. United States v. Kahan, 415 U.S. 239 (1974); United States v. Tramunti, 500 F.2d 1334 (C.A. 2, 1974), cert. denied, 419 U.S. 1079 (1974).

Under these circumstances, the holding in United States v. Hinton is not only inconsistent with settled law, but as applied to cases like this is thoroughly wrong and should be overruled.

CONCLUSION

The petition for rehearing, or in the alternative, rehearing en banc, should be granted.

Dated: September 8, 1977.

Respectfully submitted,

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Chief Assistant U.S. Attorney
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

RITA BLOOM being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 8th day of September 1977 she served a copy of the within

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REHEARING EN BANC

by placing the same in a properly postpaid franked envelope addressed to:

Harvey L. Greenberg, Esq.
16 Court Street
Brooklyn, New York 11241

Michael P. Direnzo, Esq.
15 Columbus Circle
New York, New York 10023

and deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States ~~Court House, Washington Street~~ Post Office, 271 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Rita Bloom

Sworn to before me this
8th day of September 1977.

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979